Supreme Court, U.S.
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No. 98-1241

In The

Supreme Court of the United States

October Term, 1998

KEVIN M. McGUINNESS,

Petitioner,

v.

UNIVERSITY OF NEW MEXICO
SCHOOL OF MEDICINE,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The case described and argued by Petitioner in the Petition For Writ Of Certiorari misrepresents the case and facts presented to the Tenth Circuit Court of Appeals and the United States District Court for the District of New Mexico. Petitioner was admitted to the University of New Mexico School of Medicine in 1992. Prior to his admission, he obtained a Bachelor of Science degree in chemistry and biology, a degree in physiological psychology, and a doctorate in psychology. He had worked as a forensic chemist for the DEA, and he continued to work as a clinical psychologist during medical school. On November 27, 1995, Petitioner filed a verified complaint in the United States District Court for the District of New Mexico. In the complaint, Petitioner asserted a claim under the Americans with Disabilities Act (ADA) for denial of a reasonable accommodation. In his verified complaint he asserted that he suffered from "an anxiety disorder;" that he was "substantially limited in one major life activity;" that he "sought reasonable accommodation . . . in the context of test anxiety;" and that the Respondent failed to "make reasonable accommodation" for his known disability, all in violation of the Americans with Disabilities Act (ADA). He further asserted that he "achieved an acceptable final overall average" and "an acceptable passing grade" in the Basic Biochemistry Block. He then claimed that, despite having achieved a passing grade, he "received an overall grade of marginal" that was "contrary to the prevailing grading standards" and the award of that "marginal" grade prevented him from continuing his second year in medical school.

At the District Court level, Respondent moved for summary judgment. Petitioner attempted to add, via his response to the Respondent's motion for summary judgment and a combined counter-motion for summary judgment, two new claims: (1) one under the Rehabilitation Act of 1973 (29 U.S.C. § 701) and (2) another for "association discrimination" under the ADA (42 U.S.C. §§ 12101 et seq.). He also tried to separate his "reasonable accommodation" claim into both a Title I and Title II claim. *See:* 42 U.S.C. §§ 12111-12112 and 42 U.S.C. §§ 12131-12132. The District Court found that Petitioner was not disabled within the meaning of the ADA and granted summary judgment in favor of the Respondent. The District Court also ruled on the "association discrimination" claim, holding that Petitioner had not stated a cause of action under 42 U.S.C. § 12112(b)(4) because he was not an employee of the medical school and that he had not shown that he was discriminated against because of his association with his disabled son.

On appeal, Petitioner argued that disputes of material fact existed on the issues related to Petitioner's disability, his entitlement to a reasonable accommodation, the medical school's grading policy, whether he was an employee of the medical school, and the "association claim." The Tenth Circuit Court of Appeals determined that Petitioner's disorder, as he described it, does not constitute a disability under the ADA, and affirmed dismissal of the Title II and Rehabilitation Act claims. On the question of the "reasonable accommodation claim," the Tenth Circuit determined that Petitioner could not "demand an unreasonable accommodation from the medical school" and then claim a violation of the ADA based

on denial of such an accommodation. The Tenth Circuit also held that because Petitioner's accommodation claim was unreasonable, summary judgment would have been appropriate even if Petitioner had shown a disability under the ADA. As to any possible claim under Title I, the Tenth Circuit determined that Petitioner was not an employee of the medical school nor had he satisfied the discrimination element of 42 U.S.C. § 12112(b)(4).

The facts upon which the District Court and the Tenth Circuit based their determinations and findings are a matter of record and are clearly stated in their respective opinions. Petitioner's rendition of the "facts," in his petition, includes unsupported statements, incomplete statements of fact, and new allegations. The medical school was informed by the Petitioner of his "test-anxiety" at the beginning of the basic biochemistry course and was also informed that he did not require any test-taking accommodations. It was suggested that he visit with the medical school's clinical psychologist about his "test-anxiety." He was informed of the grading policy for the basic biochemistry course. As to the remaining "facts" found in the petition, they are clear misstatements. Petitioner asserts that his disorder is related to learning in the specific subject areas of chemistry and mathematics, but testified that he does not claim to have a learning disability. He claims to have "achieved an acceptable final overall average" and "an acceptable passing grade" in basic biochemistry despite his disorder. The "reasonable accommodation" that he states he requested, but was denied, was that the professor set a clear grading standard for the course, that he not "deviate from their grading policy," and that he not regard him as lazy. The

grading policy provided to the District Court by the Respondent was textually correct.

The determinations, findings, and law relied upon by the District Court and the Tenth Circuit are set forth in their respective opinions. In Petitioner's verified complaint, the name for the disorder that he claims was not reasonably accommodated was "test-anxiety." Contrary to his assertion, the court did not rename his disorder. The District Court did determine that Petitioner's "impairment" of "feeling test anxiety in two discrete subjects matters that do not require special accommodations in testing situations is neither significant nor severe." The District Court also determined that "there has been no permanent impact resulting from the impairment that has prevented him from getting a degree in chemistry and psychology or from obtaining extremely profitable employment." The District Court and the Tenth Circuit assessed whether the Petitioner's impairment substantially limited a major life activity using a number of factors, including his ability to mitigate his anxiety in chemistry and math by altering his study habits. Based on the record from the District Court, the Tenth Circuit Court of Appeals determined that "an impairment limited to specific stressful situations," is not a disability under the ADA or the Rehabilitation Act. The Tenth Circuit also determined that Petitioner's "reasonable accommodation" claim of requesting that a professor not deviate from a grading policy, and then requesting a grade change on the belief that the policy was not followed, was unreasonable.

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED

The Petition for Writ of Certiorari should not be granted because this case raises no compelling issues that warrant review by this Court. Petitioner's questions presented and the arguments in support do not raise any compelling reasons for granting the writ. For the most part, Petitioner's asserted reasons for review are based on asserted errors by the Tenth Circuit and the District Court relating to factual findings and the application of a properly stated rule of law. Petitioner has attempted to raise new issues and facts, in his petition, that were not raised or presented to the courts below. Petitioner's arguments regarding the misapplication of the law, by the Tenth Circuit and the District Court, applicable to his disability and denial of a reasonable accommodation claim(s) are based on a fundamental misunderstanding of the law surrounding the ADA. Petitioner's questions presented and arguments in support, as related to his alleged employment status, the related Title I claim(s), and the Respondent's grading policy, are all without merit. For these reasons and those stated below, this Court should not grant the Petition for Writ of Certiorari.

A. PETITIONER'S APPENDIX C SHOULD NOT BE CONSIDERED BY THIS COURT BECAUSE IT WAS NEVER PART OF THE TENTH CIRCUIT OR DISTRICT COURT RECORD AND IT WAS NEVER ENTERED IN THIS CASE AS CONTEMPLATED IN SUPREME COURT RULE 14(1)(i)(ii)

Even after having been admonished in an order of the Tenth Circuit Court of Appeals for attempting to

include in the appellate appendix in this case evidence and documents that were not part of the district court's record, Petitioner now seeks to do the same in this Court. The document found in Petitioner's Appendix C was never part of the record before the District Court or the Tenth Circuit Court of Appeals. It was never made a part of this case by the Petitioner. The document was never entered in this case by any court or administrative agency as contemplated by Supreme Court Rule 14(1)(i)(ii). Pursuant to Supreme Court Rule 26(2), submission to this Court of the document found in Appendix C would not be allowed if this petition were granted. Its inclusion in the petition is inexcusable and should preclude any review of the petition for the Writ of Certiorari by this Court.

B. THE PETITION MISREPRESENTS THE TENTH CIRCUIT'S CONSIDERATION OF THIS COURT'S OPINION IN *BRAGDON VS. ABBOTT*

The Tenth Circuit's analysis of whether Petitioner's mental impairment substantially limited a major life activity was consistent with this Court's opinion in *Bragdon v. Abbott*, 524 U.S. 624, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998).[1] Petitioner's claim of errors by the Tenth Circuit

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[1] Petitioner's attempt to have this court consider the matters and statements found in Appendix C is improper. Appendix C was never part of the record below. As such, issues related to Appendix C could never have been considered by the Tenth Circuit in its opinion or review. Generally, this Court does not consider matters raised for the first time in a petition for

highlights his fundamental misunderstanding of the ADA and the process, as set forth by this Court in *Bragdon* and followed by the Tenth Circuit in this case, for consideration of whether or not an individual has a disability under the ADA. *Id.* at 2202. The District Court and the Tenth Circuit, as was undisputed by the parties, determined that Petitioner had an "impairment." Contrary to Petitioner's assertion in his Petition for Writ of Certiorari (pages 17-22) of "irrational prejudice" and "stereotyping" on the part of the Tenth Circuit and the District Court, his "anxiety disorder" was recognized as a "mental impairment" as defined by the ADA. (Tenth Circuit Opinion at p. 5, Petitioner's Appendix A at 11-VIII). Petitioner's misunderstanding appears to be based on the erroneous assumption that a finding of a "mental impairment" terminates further analysis, by a court, for a finding of a "disability" under the ADA.[2]

The next step for the District Court and the Tenth Circuit was to determine whether or not the life activity upon which the Petitioner relies constitutes a "major life activity." As this Court recognized in *Bragdon* and the Tenth Circuit cited in its opinion, in order to be considered a major life activity, that activity must be significant.

Writ of Certiorari. *See: Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147, n.2, 90 S.Ct. 1598, 1602, n.2, 26 L.Ed.2d 142 (1970). Petitioner's submission of Appendix C and attempt to assert issues for review related to it is conduct inconsistent with the rules of this Court and of Appellate procedure.

[2] Petitioner has asserted that he has a "anxiety disorder related to learning." That assertion only provides for a finding of a possible "mental impairment," as defined by 29 C.F.R. § 1630.2(h) (1998).

Bragdon, 118 S.Ct. at 2202. Petitioner never specified exactly what "major life activity" he claimed was substantially limited by his impairment. The District Court and the Tenth Circuit looked at the facts in their attempt to discern the "activity" that Petitioner was claiming. The District Court found that Petitioner's alleged activity was "rather hazily defined" and defined it as the ability to demonstrate competence in the specific subject areas of chemistry and mathematics in exam settings. (District Courts Opinion at p. 5 and Appendix B at 12-VII). The Tenth Circuit, relying on the District Court's attempt to discern what Petitioner was relying on as the "major life activity," defined the activity as "academic functioning." (Tenth Circuit Opinion at p. 8 and Appendix B at 11-IX).[3] Petitioner's alleged activity, as defined by the District Court and the Tenth Circuit, is not related to any of the activities listed in the ADA and Rehabilitation Act regulations. (*See:* 45 C.F.R. § 84.3(j)(2)(ii) (1997); 28 C.F.R. § 41.31(b)(2) (1997) and 29 C.F.R. § 1630.2(i) (1998).

While test-taking may be a component of academic functioning and all-around academic functioning might be considered a "major life activity," subject-specific test-taking is not an activity in and of itself. (*See: Pack v. Kmart Corp.*, ___ F.3d ___, No. 97-7120, 1999 WL 51882, at *3 (10th Cir. Feb. 4, 1999) and *Poindexter v. Atchison, Topeka, and Santa Fe Railway Co.*, ___ F.3d ___, No. 97-3273, 1999 WL 92255, at *3-4 (10th Cir. Feb. 24, 1999). Proficiency at

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[3] Petitioner's failure to specifically plead or define the "major life activity" upon which he relies is a fatal defect and should preclude any further consideration of this case by this Court.

taking tests in any one subject matter is not worthy of inclusion under the statutory definition of "major life activity" under the ADA. Contrary to Petitioner's assertion, the Tenth Circuit expressly acknowledged that it had to look beyond the public, economic, and daily dimensions to determine the significance of the activity and its comparative importance. (Tenth Circuit Opinion at p. 7, Petitioner's Appendix A at 11-VIII). The District Court and the Tenth Circuit properly determined that the activity of taking tests in two specific academic subject areas is neither significant nor "major" as contemplated by this Court's holding in *Bragdon*. The diminished ability to demonstrate proficiency in a specific subject matter may touch on a component of a "major life activity," but standing alone it is "insufficiently fundamental." *See: Colwell v. Suffolk County Police Dept.*, 158 F.3d 635, 642 (2nd Cir. 1998). If claimants were allowed to define a "major life activity" in such a narrow way, it would defeat the intent of the ADA. *Id.* at 642. Without specifically ruling as to whether or not it (academic functioning as related specifically to test-taking in a basic biochemistry course in medical school) constituted a "major life activity," the District Court and the Tenth Circuit moved on to the third step of the analysis.

Petitioner's allegation of error by the Tenth Circuit and the District Court, as can best be discerned from his petition to this Court, is really based on the application by those courts of the third step in the analysis of disability under the ADA. As this Court stated in *Bragdon*, 118 S.Ct. at 2202, the third step for a court is to ask, "tying the two statutory phrases together,. . . . whether the

impairment substantially limited the major life activity." In that regard, the District Court made that determination of law using the factors found in 29 C.F.R. § 1630.20(2). As to the nature and severity of Petitioner's impairment, the District Court concluded that "feeling test anxiety in two discrete subject matters that do not require special accommodations in testing situations is neither significant nor severe." (District Court Opinion at p. 5 and Appendix B at 12-VII). As to the remaining factors, the District Court could find no permanent or long-term impact resulting from his impairment related to the subject areas of chemistry and mathematics. It was impossible for the District Court, when considering these factors, to overlook the fact that Petitioner has an undergraduate degree in the specific subject in which he claims his impairment manifests itself during testing situations. The District Court's conclusion that his impairment had not prevented him from obtaining undergraduate and graduate degrees or from profitable employment demonstrates that there has been no substantial limitation on Petitioner's ability to demonstrate competence in a variety of subject matters or on the "major life activity" of working. Such a determination goes to both the nature and severity of the impairment and the permanent or expected long-term impact of such an impairment. (*See:* 29 C.F.R. § 1630.20(2)).

The Tenth Circuit looked at the same factors. (Tenth Circuit Opinion at p. 7, Petitioner's Appendix A at 11-VIII and 11-IX) As the Tenth Circuit correctly determined, had Petitioner demonstrated that his impairment impeded his performance in a wide variety of disciplines or affected him in all testing situations, that might (like

having an impairment that prevented a person from working at a variety of jobs) be significant and fundamental. The Tenth Circuit went further and looked at the "actual effect" of Petitioner's impairment on his first-year of medical school and correctly concluded that the fact that his "poor performance did not require that he leave the program" and "he could have repeated the first year" negated a finding of disability under the ADA. Contrary to Petitioner's assertion of error, consideration of the actual effect of an impairment on a life activity is pivotal to the ADA disability analysis. (*See: Land v. Baptist Medical Center*, 164 F.3d 423, 424-425 (8th Cir. 1999) and *Robinson v. Global Marine Drilling Co.*, 101 F.3d 35, 37 (5th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 1820, 137 L.Ed.2d 1028 (1997)). Having to study harder to achieve success in certain academic subjects is not, by any standard, a significant or substantial effect on a person's life.

Even if the Tenth Circuit had used 29 C.F.R. § 1630(j)(1) instead of 29 C.F.R. § 1630.20(2) in its analysis, the result would have been the same. (*See: Land v. Baptist Medical Center*, 164 F.3d 423, 424-425 (8th Cir. 1999). 29 C.F.R. § 1630(j)(1) uses performance or significant restriction in comparison to the general population to define the term "substantially limits." The facts demonstrate that Petitioner is clearly able to perform on exams involving mathematics and chemistry as well as the average person in the population. The average person does not have an undergraduate degree in chemistry and a Ph.D. in psychology. The average person in the population does not find themself in medical school taking basic biochemistry exams. The facts demonstrate that Petitioner is also not significantly restricted (as to the condition, manner or

duration) in his performance in chemistry and mathematics exams as compared to the average person. Application of the Tenth Circuit's determination that Petitioner had failed to "demonstrate that his anxiety impedes his performance in a wide variety of disciplines," would not have led to any different conclusion had it been analyzed under 29 C.F.R. § 1630.2(j)(1). The Tenth Circuit correctly decided that Petitioner does not have a qualifying disability under the ADA. Review by this Court is not warranted.

C. THIS COURT SHOULD NOT GRANT CERTIORARI ON THE ISSUE OF THE TENTH CIRCUIT'S CONSIDERATION OF MITIGATING MEASURES BECAUSE, IN THIS CASE, IT WAS CONSISTENT WITH THE APPLICABLE REGULATIONS AND GUIDELINES.

Contrary to Petitioner's assertions of error and his questions presented, as they relate to the determination of a "disability" and the consideration of mitigating measures, the Tenth Circuit's treatment in this case was entirely consistent with the applicable regulations and the EEOC's guidelines. Those guidelines indicate that the "determination of whether an individual is substantially limited in a major life activity" must be made "without regard to mitigating measures such as medications, or assistive or prosthetic devises." 29 C.F.R. Pt. 1630 App. § 1630.2(j). The Fifth Circuit Court of Appeal, in *Washington v. HCA Health Services of Texas, Inc.*, 152 F.3d 464, 471 (1998), determined that "whether mitigating measures should be taken into account must be determined on a case by case basis." Consideration of the past, present, and future effect of an impairment is necessary in order

to determine the nature, severity, condition, manner, duration, or long-term impact of an impairment on a major life activity – especially in a case like this where subject-specific academic functioning is at issue. Studying harder as a measure to ameliorate the impact of an impairment is not like taking a medication or using a prosthetic device. It is not outside the ordinary or average for an individual to study harder for one academic subject in order to achieve satisfactory performance in that subject. While it is true that there is division in the circuits as to use of mitigating measures as contemplated in 29 C.F.R. Pt. 1630 App. § 1630.2(j), this case, contrary to Petitioner's assertions, does not touch on those types of inquiries.[4] Petitioner's record of academic achievements, the lack of need for accommodations, and his success in working in the field of chemistry is not, as Petitioner asserts, a history of mitigation measures. It is, however, a history of no permanent or severe impact on any life activity, major or minor. Inquiry into the past, present, and future impacts of an impairment, as used to assess whether Petitioner's impairment substantially limits an unspecified activity (subject-specific academic functioning) is consistent with the regulations. (*See:* 29 C.F.R. Pt. 1630 App. § 1630.2(j); 29 C.F.R. § 1630.20(2); and 29 C.F.R.

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[4] Respondent acknowledges that this Court is in the process of reviewing the use, by courts, of mitigating measures as contemplated in 29 C.F.R. Pt. 1630 App. § 1630.2(j). (*See: Sutton v. United Airlines, Inc.*, 130 F.3d 893 (10th Cir. 1997), *cert. granted*, 67 U.S.L.W. 3433 (U.S. Jan. 8, 1999) (No. 97-1973). However, this case is much different than those under review and, even if this Court were to determine that mitigating measures should not be considered, such a decision would not change the outcome in this case.

§ 1630.2(j)(1)). Such an inquiry is an essential part of the comparative importance and average person analysis mandated by these regulations and guidelines. The Tenth Circuit's consideration of Petitioner's impairment, and their attempt to find some past or present substantial impact or limitation on a life activity, were both proper and do not warrant review by this Court.

D. THIS COURT SHOULD NOT GRANT REVIEW BECAUSE, AS THE TENTH CIRCUIT CORRECTLY DETERMINED, PETITIONER'S "REASONABLE ACCOMMODATION" CLAIM WAS UNREASONABLE.

Petitioner has misrepresented his claim as it relates to the alleged denial of a reasonable accommodation. Functionally, Petitioner's claim is nothing more than a simple grading dispute disguised as an ADA claim. Petitioner's claimed theory of "reasonable accommodation" flies in the face of every decision regarding a failure to provide a reasonable accommodation in the academic setting. *See*: *Bartlett v. New York State Bd. of Law Examiners*, 156 F.3d 321 (2nd Cir. 1998); *Argen v. New York State Board of Law Examiners*, 860 F.Supp. 84 (W.D.N.Y. 1994); *Petition of Rubenstein*, 637 A.2d 1131 (1994); *Ellis v. Morehouse*, 925 F.Supp. 1529 (N.D.Ga. 1996); *Wynne v. Tufts University School of Medicine*, 932 F.2d 19, 26 (1st Cir. 1991) and *Clark v. Virginia Board of Bar Examiners*, 861 F.Supp. 512 (E.D.Vir. 1994).[5]

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[5] In each one of these cases, there was substantial documentation of impairments that substantially limited the individual ability to learn, process information, or take tests in

This Court in *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225, 106 S.Ct. 507, 513, 88 L.Ed.2d 523 (1985) held that: "when judges are asked to review the substance of a genuinely academic decision,. . . . they should show great respect for the faculty's professional judgment" and that "plainly, [judges] may not override [the faculty's professional judgment] unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." Petitioner's claimed accommodation request for his impairment, that the medical school not "deviate from the grading policy," and the later claim of a denial of that request and further request for a grade change, is nothing more than a request for judicial review of the substance of a genuinely academic decision. Petitioner's request that this Court hold that the Respondent's grading policy is illegal is further proof of the true nature of this case. Petitioner's real displeasure is centered on the medical school's grading policy and the exercise of professional judgment that resulted in the assignment of a "marginal" grade in basic biochemistry. Even more illustrative is Petitioner's new and unsupported allegation, in his petition, that he was assured that his evaluation in medical school would not be based upon competition with others. (*See:* Petition for Writ of Certiorari at p. 6) Competition among students is at the heart of undergraduate and graduate education. Contrary to Petitioner's assertion of

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all subjects, not just a specific subject. The "major life activities" identified in those cases were not test-taking, but something more fundamental like reading or processing written information.

"irrational prejudice" and "trivalization" on the part of the Tenth Circuit, his shifting accommodation claims were correctly decided by the Tenth Circuit and the District Court. Review, by this Court, of any of those claims and those surrounding the grading policy is not warranted.

E. PETITIONER'S REQUEST FOR REVIEW BY THIS COURT TO CLARIFY THE MEANING OF EMPLOYMENT UNDER TITLE I OF THE ADA IS WITHOUT MERIT.

Petitioner, as a medical student, is not employed by the medical school and there was no evidence of a cognizable employment relationship. There is no confusion or division among the circuits, or any other courts, as to this question that would warrant any review by this Court. As the Tenth Circuit correctly concluded: "[U]nless a student receives remuneration for the work he performs, he is not considered an employee. (*See: O'Connor v. Davis*, 126 F.3d 112, 116 (2nd Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1048, 140 L.Ed.2d 112 (1998)." (*See also: Graves v. Women's Prof'l Rodeo Ass'n*, 907 F.2d 71, 72-73 (8th Cir. 1990)). There is nothing in the record to show that Petitioner had an employer-employee relationship with the Respondent under any definition. Petitioner's claims, based on Title I of the ADA, cannot be considered in the absence of such a relationship. This is not a matter worthy of this Court's review.

CONCLUSION

For the reasons given above, the Petition should be denied.

Respectfully submitted,

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